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GN Docket No. 94-33

94-33

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.
BELLSOUTH CELLULAR CORP.
BELLSOUTH WIRELESS, INC.
MOBILE COMMUNICATIONS CORPORATION OF
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Further Forbearance from Title II
Regulation for Certain Types of
Commercial Mobile Radio Service
Providers)

GN Docket No. 94-33

To: The Commission

COMMENTS OF BELLSOUTH

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., BellSouth Wireless, Inc., and Mobile Communications Corporation of America (collectively "BellSouth") hereby submit their response to the Commission's *Notice of Proposed Rule Making* (FCC 94-101, released May 4, 1994) ("*NPRM*") in this proceeding. BellSouth generally supports the Commission's proposals to further forbear from applying sections of Title II of the Communications Act of 1934 *to the extent that such forbearance is applied equally to all providers of commercial mobile radio service ("CMRS").*^{1/} BellSouth opposes efforts to create disparate forbearance among varying classes or types of CMRS providers.

^{1/} CMRS is defined in Section 332 of the Communications Act, as amended, as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). The Commission has concluded that CMRS includes, *inter alia*, cellular service, paging, specialized mobile radio ("SMR") licensees providing interconnected service, and broadband and narrowband personal communications services ("PCS") on a presumptive basis. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd. 1411, 1450-51, 1452-53, 1454-55, 1460-61 (1994) ("*Second Report and Order*").

Section 332 of the Communications Act requires that all providers of CMRS be treated as common carriers and grants the Commission specific authority to forbear from applying the provisions of Title II of the Act to such carriers, with the exception of Sections 201, 202, and 208.^{2/} Pursuant to such authority, the Commission decided to forbear from applying Sections 203, 204, 205, 211, 212, and 214 of Title II to services classified as CMRS.^{3/} The Commission has now initiated the instant rule making to determine if further forbearance from the remaining sections of Title II^{4/} is justified for particular types of CMRS providers within each class of service. (*NPRM*, ¶ 1). BellSouth supports the Commission's efforts to remove the regulatory burdens imposed by the remaining sections of Title II, *to the extent that such burdens will be removed from all CMRS providers*.

As all categories of CMRS are, or will be, subject to competition,^{5/} market conditions do not justify forbearance from applying Title II regulations with respect to certain CMRS providers, but not others.^{6/} As a result, BellSouth opposes any proposals to create a regulatory scheme which forbears from applying provisions of Title II with

^{2/} 47 U.S.C. § 332(c)(1)(A).

^{3/} *Second Report and Order*, 9 FCC Rcd. at 1478-81. In the regulatory parity docket, BellSouth urged the Commission to forbear from Title II regulation "to the greatest extent possible" due to the competitive nature of CMRS. Comments of BellSouth to *Notice of Proposed Rule Making* in GN Docket No. 93-252, at 28-31 (filed Nov. 8, 1993) ("BellSouth Regulatory Parity Comments").

^{4/} Sections 210, 213, 215, 218-20, 223, and 225-28 are under consideration.

^{5/} See *infra* notes 14-15 and accompanying text (discussing competition in the CMRS marketplace).

^{6/} In carving out a limited exception allowing for permissible differential regulation by the Commission, Congress was concerned that *market conditions* might justify different treatment among various classes of CMRS. See H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report"); see also discussion *infra* at pp. 4-5.

respect to only certain classes of CMRS providers, while leaving them in place for others.^{7/} Such a scheme would be inconsistent with Congress' objective to remove regulatory distinctions, which impede growth in the industry and stifle competition, between providers of like services.^{8/} Regulatory distinctions among competitors skew the competitive marketplace, causing the industry to be governed by regulatory strategies instead of competition. In essence, the Commission should forbear from applying the remaining sections of Title II, to the greatest extent possible under the statutory criteria,^{9/} to *all* providers of CMRS, or it should not engage in further forbearance at all.

The Commission has recognized that Congress intended "to ensure that similar services would be subject to consistent regulatory classification . . . to achieve

^{7/} Obviously, regulations that pertain only to particular types of services should not be applicable to other services. For that reason, BellSouth has urged the Commission to exempt non-voice services from the Telecommunications Relay Service ("TRS") plan, which is designed to provide the hearing impaired with access to *voice* services. The TRS requirement has no logical applicability to *non-voice* services, which are already fully accessible to the hearing impaired. See Response of BellSouth to *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services* in GN Docket No. 93-252, at 5-6 (filed June 16, 1994).

^{8/} See, e.g., H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259-61 (1993).

^{9/} In order to forbear from imposing a section of Title II with regard to CMRS providers, the Commission must make the following determinations:

- (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (ii) enforcement of such provision is not necessary for the protection of consumers; and
- (iii) specifying such provision is consistent with the public interest.

regulatory symmetry in the classification of mobile services."^{10/} In addition, it recognized that Congress sought "to ensure that an appropriate level of regulation be established and administered for CMRS providers . . . [acknowledging] that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace."^{11/} Although the legislative history behind the enactment of Section 332 indicates that "differential regulation of commercial mobile services is permissible" in determining whether to forbear from applying specific provisions of Title II, Congress also directed that such regulation "is not required in order to fulfill the intent of [Section 332]."^{12/} Thus, disparate regulation can exist only if there is a basis for such regulation.

While in certain instances market conditions may justify disparate regulation,^{13/} disparate regulation of CMRS would frustrate Congress' twin goals enumerated above, given the competitive nature of CMRS. The commercial mobile service marketplace is and will continue to be competitive,^{14/} and no carrier has market dominance in the provision of any mobile service. For example, the Commission has recognized that PCS "will be subject to substantial competition, both from other PCS services . . . and from the wide range of radio services currently offered such as cellular

^{10/} *Second Report and Order*, 9 FCC Rcd. at 1418.

^{11/} *Id.*

^{12/} Conference Report at 491; *see NPRM*, ¶ 4; *see also* 47 U.S.C. § 332(c)(1)(A).

^{13/} *See supra* note 6.

^{14/} *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Notice of Proposed Rule Making*, GN Docket No. 93-252, 8 FCC Rcd. 7988, 8000 (1993) ("*Regulatory Parity NPRM*").

services, specialized mobile radio services, and paging service."^{15/} The Commission has previously recognized that competition reduces the need for regulation,^{16/} and has stated that

[s]uccess in the marketplace . . . should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs -- *and not by strategies in the regulatory arena*. This *even-handed regulation*, in promoting competition, should help lower prices, generate jobs, and produce economic growth.^{17/}

BellSouth has previously shown that creating separate regulatory classifications within CMRS could set the foundation for disparate treatment of similar entities, a problem which Congress intended to eliminate.^{18/} The Commission can avoid such problems by applying forbearance of Title II provisions to all CMRS providers in an "even-handed" manner.

Regardless of which provisions of Title II require further forbearance, further forbearance only for *particular types* of CMRS providers would not comport with the notion of regulatory symmetry. Specifically, the *NPRM* proposes forbearing from certain Title II sections for small CMRS providers only, *i.e.*, those providers with specialized markets, a small customer base, and/or a limited operation, and asks for

^{15/} *Id.* (quoting *Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rule Making and Tentative Decision*, GEN Docket No. 90-314, ET Docket No. 92-100, 7 FCC Rcd. 5676, 5712 (1992)). BellSouth has previously shown that the cellular marketplace is competitive. See Comments of BellSouth to *Notice of Proposed Rulemaking* in GEN Docket No. 90-314, at 67-69 (filed Nov. 9, 1992).

^{16/} See *Policy and Rules Concerning Rates for Competitive Common Carrier Services, Notice of Inquiry and Proposed Rule Making*, 77 FCC 2d 308, 313-14, 334-38 (1979); *First Report and Order*, 85 FCC 2d 1, 1-12, 31 (1980) (subsequent history omitted); *Regulatory Parity NPRM*, 8 FCC Rcd. at 8000.

^{17/} *Second Report and Order*, 9 FCC Rcd. at 1420 (emphasis added).

^{18/} BellSouth Regulatory Parity Comments at 27.

comments on how to define a "small" provider. (*See NPRM*, ¶¶ 17, 23, 32-37). The Commission should not engage in drawing fine distinctions between providers based upon their overall size. Such distinctions will be subject to varying interpretations, and will result in additional regulatory burdens for the Commission in terms of identifying eligible entities and policing evasive behavior, leading to a loss of time, money, and scarce Commission resources.^{19/}

These fine distinctions between carriers are precisely what Congress sought to eliminate in mandating regulatory parity.^{20/} The Commission should avoid such a result by even-handed forbearance, as discussed above. To the extent that certain CMRS providers may have very unique circumstances, determinations can be made by petitioning the Commission to forbear on a case-by-case basis. (*See NPRM*, ¶ 38).

Congress intended that the Commission implement a regulatory scheme that utilizes a broad definitional approach to categorize services and a simple regulatory structure to assure regulatory parity in a highly competitive marketplace. Accordingly, the Commission should either forbear with equality from applying those provisions of Title II it deems appropriate to *all* CMRS providers, or it should abstain from further forbearance altogether.

^{19/} Sham arrangements, management contracts, "shell" corporations, statistical manipulation, and other devices and/or collusive behavior will undoubtedly be utilized to take advantage of the benefits of inclusion in the class of CMRS licensees qualifying for exemption. As a result, the same kind of regulatory asymmetry that led to the 1993 amendment of Section 332 will occur.


^{20/} One can foresee, for example, that if some CMRS licensees are exempt from Title II provisions that apply to other CMRS licensees, and, as a result, have cost advantages over other CMRS licensees, the number of parties seeking exempt status will grow rapidly and the Commission will have to address complaints by non-exempt licensees about the lack of regulatory parity and the resulting competitive imbalance.

CONCLUSION

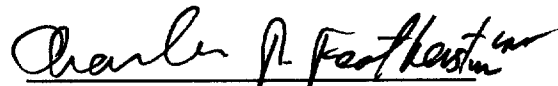
For the foregoing reasons, BellSouth submits that the public interest would be served by applying an even-handed forbearance scheme to all CMRS providers.

Respectfully submitted,

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